O.S.K. & PARTNERS SDN.

v.

TENGKU NOONE AZIZ TENGKU MAHMOOD & ANOR.

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH LP
ABDUL RAZAK J
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 10 OF 1982]
21 DECEMBER 1982

ADMINISTRATIVE LAW: *Certiorari - Application to quash decision of Kuala Lumpur Stock Exchange Committee - Preliminary question of law - Whether committee amenable to certiorari.*

The appellant, carrying on business of a stock broker as a member of the Kuala Lumpur Stock Exchange ('the Exchange') applied for an order of *certiorari* against the respondents, the Kuala Lumpur Stock Exchange Committee ('the Committee') to quash the decision of the Committee to impose a penalty on the appellant for alleged breaches of the Rules of the Exchange. At the hearing of the substantive motion for *certiorari*, it was agreed that a preliminary question of law should be decided in the first instance as to whether the Committee was a body against which *certiorari* would lie. The trial Judge held it would not. He placed considerable reliance on the undertaking given by the appellant to the Committee in the prescribed form "to be bound in all respects by and to comply with the Rules", holding that it emphasised the strictly contractual nature of the relationship between the parties. The appellant appealed.

Held:

[1] The undertaking did not mean that the Exchange had *carte blanche* to act arbitrarily and outside the scope of its powers when exercising its functions and duties which are legislatively directed and regulated and therefore of a public rather than a private nature.

[2] The Exchange is a hybrid corporation - a company incorporated under the Companies Act but recognised and regulated by the Securities Industry Act 1973, with therefore an element of public flavour superimposed on the contractual element in relation to its members.

[3] The Committee which is responsible for the management of the affairs of the Exchange is accordingly a body of persons having legal authority to determine the rights of persons licenced under the Securities Industry Act. In purporting to exercise its disciplinary functions it necessarily has the duty to act judicially and is therefore subject to judicial review by way of *certiorari* and prohibition. *Certiorari* and prohibition would lie against any body of persons who having legal authority to determine questions affecting the rights of subjects, and hence having the duty to act judicially, act in excess of their legal authority. The exact limits of *certiorari* have never been and ought not to be specifically defined, the only constant limit being that the tribunal performs a public duty.

[Appeal allowed.]

Cases referred to:

R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. [1920] Ltd. [1924] 1 KB 171

Ridge v. Baldwin [1964] AC 40

R. v. Manchester Legal Aid Committee, Ex parte R.A. Brand & Co. Ltd. [1952] 2 QB 413

Reg. v. Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 QB 864
Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain & Ors. [1978] 1 QB 678 [1979] 1 QB 425
Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook [1976] 1 WLR 1052
Reg. (Doris) v. Ministry of Health & Local Government and the Northern Ireland Health Services Board [1954] NI 79
Reg. v. Wadley, Ex parte Burton [1976] Qd R 286

Legislation referred to:
Securities Industry Act 1973 ss. 2(1), 5, 6, (2)(b)(ii), (vi), (2)(c), 7, 8, 9, 10, 52, 54(1), (5), 55, 56, 58, 61, 62, 64 to 82, 98(1), (2)

For the appellant - Raja Aziz Addruse; M/s. Rithaudden & Aziz
For the respondent - Wong Chong Wah; M/s. Skrine & Co.

JUDGMENT

Proem: The issue and background

How far can the long arm of *certiorari* reach? To whom can it extend? These are the central questions which radiate from and constitute the core of the sole issue on a preliminary point of law posed for resolution in this appeal as to the amenability of decisions of the Kuala Lumpur Stock Exchange Committee to orders and directions of this nature.

The appellant, an unlimited company incorporated under the Companies Act 1965, carrying on the business of a stock broker as a member of the Kuala Lumpur Stock Exchange ('the Exchange') sought and obtained leave to apply for an order of *certiorari* against the Committee of the Exchange which is conferred with authority and power to manage and regulate its affairs (under Article 30 of its articles of association) in representative proceedings against the respondents ('the Committee') to quash the decision of the Committee made on 21 April 1979 imposing a fine of RM5,000 on the appellant under Article 27 of the articles of association of the Exchange for alleged breaches of rr. 4(1) and (m) of the Rules of the Exchange consequent to the rejection by the Registrar of Companies as the licensing authority under the Securities Industry Act 1973 ('the Act') of the application for a dealer's licence under the Act by one of the appellant's shareholders and directors by reason of which he ceased to be authorised to deal in securities with certain consequential results necessitating requisite ancillary action on the part of the appellant. The appellant complains that before arriving at its decision to impose the fine, the Committee did not apparently indicate to it that it had breached the rules in question or give it an opportunity to be heard, and it is further alleged that the Committee had erred in law in its construction of the effect and the purported application of these rules.

It is not necessary for present purposes to go into the circumstances culminating in the decision of the Committee sought to be impugned as this appeal only involves a juristic issue as to whether judicial review by way of *certiorari* is available against the Committee. At the hearing of the substantive motion for *certiorari,* it was agreed by Counsel on both sides that a preliminary question of law should be decided in the first instance, *scilicet,* whether the Committee is a body against which *certiorari* will lie. Hashim Yeop A. Sani, J, after hearing argument and in a reserved judgment delivered on 22 December 1981 held it is not on the grounds that (a) the Exchange (and, it would follow, the Committee) is essentially a private body, (b) the relationship between the parties is strictly contractual in nature, (c) the Committee is not under any express or implied duty to act judicially when exercising disciplinary powers and (d) the functions of the Exchange are not in any way manifestly public in nature as it is no more than an exclusive business club.

It would perhaps be convenient and appropriate for the purposes of this appeal against that order to deal first with the principles of law arising for consideration and application in this case and then discuss the structure, nature, powers, duties, functions and synoptical standing of the Exchange in the light of the law to determine whether the Committee is subject to judicial review in the circumstances in the matter of the penalty imposed on the appellant. To avoid tautology, statutory references in this judgment are to the Act.

The Law

The starting point must necessarily be the *locus classicus* on this aspect of judicial review - *R. v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co.* [1920] Ltd. [1924] 1 KB 171 in which in a famous passage which has been repeatedly referred to and relied on since, Atkin, LJ, said (at p. 205) that *certiorari* and prohibition would lie against 'any body of persons having legal authority to determine questions affecting the rights of subjects' and that where there is judicially, act(ing) in excess of their legal authority'. There has been some confusion on the purpose and import of the words 'the duty to act judicially' which however has since been put right by a reinterpretation thereof by Lord Reid in *Ridge v. Baldwin* [1964] AC 40, 74 - 79, 130 (at pp. 74 - 79) where he explained in effect that in the correct analysis this phrase was simply a corollary and the automatic consequence of the power 'to determine questions affecting the rights or subjects' and that where there is any such power there must be the duty to act judicially. Lord Hodson also in that case (at p. 130) criticised the fallacy of saying that 'the giver of the decision is acting in an executive or administrative capacity as if that was the antithesis of a judicial capacity'. The House of Lords made it clear in that case if a tribunal is able to affect rights, that in itself shows that the Courts can supervise the tribunal through the prerogative orders and it is not necessary to employ terms such as quasi-judicial. Even as far back as 1952 the Divisional Court in England was able to say in *R. v. Manchester Legal Aid Committee, Ex parte R.A. Brand & Co. Ltd.* [1952] 2 QB 413, 428 - 429 (at pp. 428 - 429):

> The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively.

It need hardly be said that a person who, although he has authority to determine questions, owes that authority solely to a private contract is not exercising legal authority in a public law context. Private clubs and private arbitrators, for instance, are beyond the reach of *certiorari* and prohibition as their powers derive soley from contract. The limits to the right of *certiorari* and prohibition have, however, yet to be exhaustively defined and this position is now highlighted by the decision of the English Court of Appeal in *Reg. v. Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864, 882 where it was held that *certiorari* would lie where the Compensation Board derived its authority not from statute but from an exercise of the royal prerogative. The basis for the grant of *certiorari* there lay in the nature of the functions performed by the Board. It was charged with the judicial determination of the question whether, and to what extent, compensation should be paid, that determination forming an essential precondition to the payment of compensation by the Crown. It was this feature of the Board's functions that made it amenable to *certiorari.* It would appear that the relevant enquiry was not so much as to the source of the respondent's power, but as to the character of that power, and that *ceteris paribus certiorari* would lie to any respondent who had powers of a public rather than a private or domestic nature. Lord Parker CJ, said *inter alia* in that case (at p. 882) that the exact limits of *certiorari* have never been and ought not to be specifically defined as they have varied from time to time being extended to meet changing conditions, and the only constant limits throughout were that the tribunal was performing a public duty.

In *Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain & Ors.* [1978] 1 QB 678, 688 which was however reversed by the Court of Appeal [1979] 1 QB 425, 448, 455 - 458, 463 - 466] on the substantive issue of whether disciplinary proceedings against prisoners were subject to judicial review, Lord Widgery, CJ, said in the Divisional Court (at p. 688):

> One must start this question of whether *certiorari* will or will not go with a recognition of the fact that there is not, and one may hope never will be, a precise and detailed definition of the exact sort of order which can be subject to *certiorari*. If we ever get to the day one turns up a book to see what the limit of the rights of *certiorari* is it will mean that the right has become rigid, and that would be a great pity. Therefore, we approach it today, in my judgment, on the basis that there are no firm boundaries, and one has to look to such clear and useful, helpful pointers as, with the assistance of Counsel, we have been able to derive from the authorities.

The undefined limits and the extension of the scope of the remedy of *certiorari* over recent years were reaffirmed by the Court of Appeal in that case (at p. 448 per Megaw LJ, pp. 455 - 458 per Shaw LJ, and pp. 463 - 466 per Waller LJ).

A body statutorily vested with jurisdiction over persons who have entered into contractual relationships with it may be subject to prerogative orders though the occasion for the exercise of this jurisdiction may only accrue after the contractual relationship is entered into. *Ex parte Lain* [1967] 2 QB 864, 882 would appear to suppeditate the key to opening the doors for the extension of the prerogative orders to bodies owing their powers solely to contract provided their powers although contractual are infused with a public element, and there is also authority to the effect that a body legislatively recognised may be subject to such jurisdiction. In *Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 WLR 1052, 1060 the English Court of Appeal quashed by *certiorari* the revocation of a licence involving both a contractual element and the common law right to trade in a market, and we would advert to the judgment of Scarman LJ, (at p. 1060) on the question of the element of public law present in that case and the fact that the contractual licence was available in accordance with the discretion conferred by a statute regulating the common law right. That case in holding that a body vested with jurisdiction over persons with whom it has entered into a contractual relationship is subject to *certiorari* went on to decide that in those circumstances in exercising the contractual right it was under a duty to act judicially. *Reg (Doris) v. Ministry of Health & Local Government and the Northern Ireland Health Services Board* [1954] NI 79 decided that *certiorari* would lie to review decisions of the Dental Services Committee and of the Ministry's appeal committee notwithstanding that those bodies exercised a jurisdiction arising out of a contract between a practitioner and the Health Services Board. In *Reg. v. Wadley, Ex parte Burton* [1976] Qd R 286, 295 where a turf club's functions were afforded legislative recognition, it was held (at p. 295) that a domestic tribunal recognised by the legislature is subject to prohibition.

So much then for the law.

The Exchange

We now turn to consider the constitution, structure, purpose and functions of the Exchange.

The Exchange is a company limited by guarantee incorporated under the Companies Act and was formed by the consensus of its members. It was in existence prior to the Act which was enacted in 1973 but brought into force only on 27 December 1976. Its governing body is the Committee under Article 30 of its articles of association. When the Act became operative the Exchange was recognised by the Act and deemed by s. 98(1) to be a stock exchange

approved under Part III thereof with a requirement for it to provide in its rules to the satisfaction of the Minister [defined as the Minister responsible for the securities industry - s. 98(2)] all matters specified in s. 6(2)(b) within six months from the commencement of the Act. The Act introduced several provisions affecting and in effect regulating the affairs and functional operation of the Exchange.

Section 5 prohibits the establishment or maintenance of a stock market other than that of a stock exchange. Section 6 empowers the Minister to approve a body corporate as a stock exchange if he is satisfied with regard to the several matters specified in sub-section (2) thereof, and in particular under para. (b) of that sub-section that its rules make satisfactory provision for the matters enumerated therein and we would refer especially to sub-paragraphs (ii) for the expulsion, suspension or the disciplining of members and (vi) generally for the carrying on of the business of the stock exchange with due regard to the interests of the public, and para. (c) that the interests of the public will be served by the granting of his approval. It will be seen therefore that the public element by the injection of the Minister's dominant role and more especially regard for the public interest is specifically provided for in the establishment of a stock exchange, and by s. 98(1) the Exchange itself is deemed to be a stock exchange approved under s. 6 as from 27 December 1976 and accordingly recognised and regulated by the provisions of the Act. Section 7 requires the Minister to be notified of any amendment to the rules [as defined in s. 2(1) to include *inter alia* the memorandum and articles of association] of a stock exchange with power for him to disallow the whole or any specified part of the amendment in question. Sections 9 and 10 provide that no person shall carry on a business of dealing in securities or hold himself out as such unless he has a dealer's or a dealer's representative's licence and s. 8 prescribes a grace period for penalties for non-compliance therewith after the implementation of the Act.

Section 52 provides for the right of the committee of a stock exchange to impose on its members further obligations or requirements not affected by the provisions of Part VII of the Act. Section 54 makes provision for certain moneys to be deposited by a stock broker with the stock exchange of which he is a member or by which his firm or company is recognised and we would refer in particular to sub-sections (1) and (5) thereof. Section 55 enacts that certain moneys are to be held by a stock exchange on trust and s. 56 requires deposits to be invested by a stock exchange. Section 58 enjoins a stock exchange to establish and keep proper accounts of all deposits. Section 61 stipulates that a stock exchange shall establish and keep a fidelity fund constituted in terms of the provisions of s. 62 and to be administered by its committee on its behalf. Sections 64 to 82 make ancillary provisions relating to the powers and duties of a stock exchange and its committee with regard to fidelity funds and we would refer in particular to the provisions of s. 67 which make it a mandatory prerequisite for a contribution of not less than RM1,000 to the fidelity fund of a stock exchange for membership of it or partnership in a member firm or directorship of a member company and also for a compulsory annual contribution thereto of not less than RM500.

The objects for which the Exchange is established are specified in para. 3 of its memorandum of association and sub-paragraph (a)(i) thereof states its primary object is 'to provide, regulate and maintain facilities for conducting the business of a stock exchange in Malaysia'. Turning now to its articles of association, Article 6 prescribes the qualifications for membership and refers primarily to a dealer in securities. Article 7 gives power to the Minister in connection with membership of non-citizens. Under Article 10 only dealers can be members of the Exchange and they must be licensed under the Act as such. Article 27 provides for suspension, expulsion or other disciplinary action and we refer in particular to para. (f), (h) and (i). Article

30 relates to management and the establishment of the Committee to manage and regulate the affairs of the Exchange and Article 50 lays down the powers and duties of the Committee and specifically stipulates that these are subject to such rules and regulations, not being inconsistent with the articles or the provisions of the Act, as may be prescribed by the Exchange in general meeting. We then have the Rules of the Exchange relating to member firms and member companies and refer to r. 2 as to the mode of trading and r. 3 and 4 in respect of the requirements and conditions that must be complied with and observed by member firms and companies. Rule 2(2) provides for an undertaking by every member firm and member company to observe the rules in consideration for the privileges of trading on the Exchange and the use of the Exchange's trading facilities as a prerequisite to recognition of its membership. Rule 2(1) is basically to the effect that a licensed dealer under the Act has to trade as a stock broker or dealer in securities as a member of a member firm or a member company. Rule 8 deals with suspension, withdrawal of recognition or other disciplinary action on the lines of Article 27 of the articles of association of the Exchange but with some additional provisions and was made no doubt to satisfy the requirements of s. 6(2)(b)(ii).

We should perhaps immediately touch on the matter of the undertaking given by the appellant to the Committee under r. 2(2) on 7 April 1977 in the prescribed form. Much had been made out of this undertaking and the learned Judge placed considerable reliance on it in holding that it emphasised the strictly contractual nature of the relationship between the Exchange and the appellant and other members. We do not think that any such conclusion is necessarily justified as wholly detracting from the public element in the conceptual scheme as the position would be no different even had there been no requirement for such an undertaking since the parties would be bound by the provisions of the articles of association and rules in any event. The undertaking 'to be bound in all respects by and to comply with the Rules' does not mean that the Exchange has *carte blanche* to act arbitrarily and outside the scope of its powers in dealing with its members when exercising its functions and duties which are legislatively directed and regulated and therefore of a public rather than a private nature. Total reliance on the undertaking in question *per se* would appear to involve the fallacy of *petitio principii* as it begs the question in issue in that the point for determination is whether the Exchange has legal authority to determine questions affecting the rights of stock brokers and is therefore under a duty to act judicially in the circumstances.

The Upshot

In the light of the provisions of the Act and the constating and governing instruments we have referred to and on an application of the principles of law we have adumbrated, it would appear that the Exchange is a hybrid corporation - a company incorporated under the Companies Act but recognised and regulated by the Act and subject to its governance and authority with therefore an element of public flavour superimposed on the contractual element in relation to its members. It is a statutorily regulated entity under the overall direction and control of the Minister in fundamental respects, thus manifesting a distinctive public element which is reflected particularly in the requirements of the provisions of s. 6(2)(b)(vi) and (c) which prescribe the public interest as the prime consideration. The exercise of disciplinary powers by the Exchange is conferred and prescribed by legislation under which the Minister is to approve the scope and type of such powers and the exercitation whereof would affect the livelihood of its members. Generally statutes regulating the several professions provide for a body to be established to exercise disciplinary powers over its members but under the

Act the method of discipline is effected by delegating that power to a body not established by the Act itself but which must be approved by the Minister pursuant to and is controlled and subject to its provisions, and so it virtually comes to the same thing.

We should perhaps add, *anent* the learned Judge's assessment of its genre, that we cannot but express in the circumstances in our view, pithily put perforce, that the Exchange is no more an exclusive business club than the Criminal Injuries Compensation Board [in *Ex parte Lain* which has been repeatedly applied since] can be said to be merely a welfare benefit society. The Board in that case contended that it had no real authority as its decisions only gave people a better but unenforceable chance of receiving charity from the Crown, but the Court said that this did not detract from its authority.

The Committee which is the responsible for the management of the affairs of the Exchange is accordingly a body of persons having legal authority to determine the rights of persons licensed under the Act to carry on business as stock brokers and it follows that in purporting to exercise its disciplinary functions it necessarily has the duty to act judicially in the adhibition of that power and it is therefore subject to judicial review by way of *certiorari* and prohibition.

The result

In the premises we allowed this appeal with costs at the conclusion of argument, set aside the order of the learned Judge and remitted this matter to the High Court for the continued hearing of the substantive motion for *certiorari* on its merits and ordered the deposit lodged in Court by way of security to be paid out to the appellant.

Also found at [1983] 1 CLJ 288